

ALETA G. COSTEN, et al.,
Appellants,
vs.
PAULINE'S SPORTSWEAR, INC.,
et al.,
Appellees.

PAULINE'S SPORTSWEAR, INC.,)
et al.,)
)
Appellees.)
)
)

MAY 8 1967



IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ALETA G. COSTEN, et al.,)	
)	
Appellants,)	No. 21387
)	
vs.)	
)	
PAULINE'S SPORTSWEAR, INC.,)	
et al.,)	
)	
Appellees.)	
)	
)	

APPELLANT'S OPENING BRIEF

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THE
 STATE OF NEW YORK
 IN SENATE
 JANUARY 1, 1903

REPORT

OF THE
 COMMISSIONERS OF THE LAND OFFICE
 IN RESPONSE TO A RESOLUTION
 PASSED BY THE SENATE
 MARCH 1, 1899

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JURISDICTIONAL STATEMENT

Notice of appeal was filed with the District Court on April 27, 1966 [R. 154].* Appeal is taken from the Order of the District Court made and filed on April 5, 1966 [R. 153], and entered in the docket on April 6, 1966 [R. 163].

The United States Court of Appeals for the Ninth Circuit is vested with jurisdiction of this appeal from a final Order of the United States District Court for the Southern District of California, Northern Division, by Judicial Code §§ 1291 & 1294(1), 28 U.S.C. §§ 1291 & 1294(1).

* Citations to the Record on Appeal throughout Appellant's briefs are in the above form, which indicates the page in the (Clerk's) Transcript of Record. There is no reporter's transcript.

DECLARATORY JUDICIAL STATEMENT

Notice of Appeal was filed with the District

Court on April 27, 1966 [S. 1231 & 1232]. Appeal is taken
from the Order of the District Court made and filed
on April 27, 1966 [S. 1231], and entered in the docket
on April 27, 1966 [S. 1231].

The United States Court of Appeals for the

Ninth Circuit is vested with jurisdiction of this
appeal from a final order of the United States Dis-
trict Court for the Southern District of California,
Los Angeles Division, by Judicial Case # 1231 & 1232(1).
U.S.A.C. # 1231 & 1232(1).

* Citation to the record on Appeal through-

out appellant's briefs are in the above form, which
indicates the page in the (Court's) transcript of
record. There is no appellant's transcript.

SPECIFICATIONS OF ERROR

(1) The District Court erred by its order of April 5, 1966, dismissing the First Amended Complaint.

(2) The District Court erred by its order of January 14, 1966, dismissing the Complaint.

(3) The District Court erred by its order of November 24, 1965, granting defendants' motion to dismiss.

(4) The District Court erred by its order of November 24, 1965, in that its said order dismissed those claims stated under Sherman Act § 2, as amended, 15 U.S.C. § 2; Clayton Act §§ 3 and 4, 15 U.S.C. §§ 14 and 15 [Counts Two, Three, Five, Six, Eight, Nine, Eleven, and Twelve of the Complaint].

SPECIFICATION OF EVIDENCE

(1) The District Court acted by its order

April 1, 1955, dismissing the first amended Complaint.

(2) The District Court acted by its order

January 14, 1955, dismissing the Complaint.

(3) The District Court acted by its order

November 24, 1955, granting defendant's motion to dismiss.

(4) The District Court acted by its order

November 24, 1957, in that its said order dismissed

and also entered upon Shuman Act 2, as amended.

U.S.C. § 2; Clayton Act §§ 3 and 4, 15 U.S.C. §§

4 and 12; Courts Two, Three, Four, Five, Six, Eight, Nine,

Ten, and Twelve of the Complaint.

STATEMENT OF THE CASE

This appeal is taken by six persons, all plaintiffs below, from the District Court's order [R. 153] dismissing the first amended complaint. Appellees are Pauline's Sportswear, Inc., Robert C. Abild, and Desda S. Abild. One named defendant, Regal Accessories of New York, is not a party to this appeal. Appellants seek review of both the dismissal of the first amended complaint [R. 114, ff.] and the original complaint [R. 2, ff.]. The order dismissing the original complaint [R. 93-4], was clarified by the memorandum [R. 106] that stated findings were not required. Finally, a so-called "Judgment" [R. 111] was entered dismissing the complaint.

The first amended complaint [R. 114, ff.] was filed on February 10, 1966. On April 5, 1966 the District Court made its order [R. 153] dismissing the first amended complaint "for the reasons set forth in the dismissal of the original complaint." At this point, Appellants filed their notice of appeal and thereby abandoned any further opportunity to amend

STATEMENT OF THE CASE

This appeal is taken by six persons, all
indicated below, from the District Court's order
of [REDACTED] dismissing the first amended complaint.
The appellants are Pauline's Spouse, Inc., Robert E.
Auld, and David E. Auld. One David Auld, a
legal associate of New York, is not a party to this
appeal. Appellants seek review of both the dismissal
of the first amended complaint [REDACTED] and the
original complaint [REDACTED]. The second amended
complaint [REDACTED] was filed on
the original complaint [REDACTED], the dismissal of
the second amended [REDACTED] that stated findings were not
suggested. Finally, a so-called "Amendment" [REDACTED]
was entered dismissing the complaint.
The first amended complaint [REDACTED].
was filed on February 10, 1960. On April 2, 1960 the
District Court made its order [REDACTED] dismissing the
first amended complaint "for the reasons set forth in
the dismissal of the original complaint." At this
point, appellants filed their notice of appeal and
thereby exhausted any further opportunity to amend

their pleading.

Of course there is no Reporter's Transcript filed in this cause, as the only factual matter before this court consists solely of allegations in the original and the amended complaint. Plaintiffs charged violations of Sherman Act §§ 1 and 2, and Clayton Act § 3, and sought treble damages under Clayton Act § 4, as amended.

The original complaint was in twelve counts, in groups of three counts. Each group of three counts was based upon relations of the defendants with one particular franchise operation, there being four franchise operations involved in this action. There is no substantial difference in the allegations relative to one operation or another. Counts One, Four, Seven, and Ten charge resale price maintenance in violation of Sherman Act § 1. Counts Two, Five, Eight, and Eleven charge a monopolization violation of Sherman Act § 2. Counts Three, Six, Nine, and Twelve charge violation of Sherman Act § 1 [cited as "§ 2"] and Clayton Act § 3, through exclusive dealing and illegal

tie-ins.

The first amended complaint simply omitted the charged violations of Sherman Act § 1 as to each of the four franchise operations. Thus, the amended complaint did not rely on any claims of resale price maintenance, but included the charges of monopolization, exclusive dealing, and illegal tie-ins. The following factual statement is taken from the original complaint, Counts One, Two, and Three, on behalf of Appellant, Aleta G. Costen.

On June 20, 1964 Appellees made a franchise agreement with Mrs. Costen for a retail ladies' sportswear shop at the Bay Fair Shopping Center in San Leandro, California. The franchise agreement required her to purchase all merchandise requirements from Appellees, and the Appellees prohibited her merchandising at that location any ladies' sportswear produced or sold by anyone other than the Appellees. The premises were sub-leased to Mrs. Costen by Appellees.

As alleged in paragraph three of Count Three

The first amended complaint simply omitted the charges of violation of Section 100 and 101 and the four fraudulent transactions. Thus, the amended complaint did not rely on any claim of fraud or misrepresentation, but included the charge of economic loss, exclusive dealing, and illegal division. The following factual statement is taken from the original complaint, Counts One, Two, and Three, as stated in Exhibit A, Page 10.

On June 20, 1966 Appleton was a successful business with its own, custom for a retail business, located at the Bay View Shopping Center in San Francisco, California. The franchise agreement required that to purchase all merchandise, Appleton must purchase from Appleton, and the Appleton provided for business at that location was limited, exclusive for Appleton and its agents. Appleton was the only one to sell or anyone other than Appleton. The franchise was sub-leased to Mrs. Carter by Appleton.

As alleged in paragraph 10 of Count Three

[R. 7] of the original complaint:

"Said sub-lease and said franchise agreement were expressly conditioned upon restrictions that plaintiff COSTEN deal only in ladies' sportswear manufactured and supplied by defendants and plaintiff COSTEN was expressly prohibited from purchasing or selling merchandise manufactured or sold by anyone other than the defendants; such restrictions tied the tenancy under said sub-lease to an obligation to purchase women's sportswear for resale from the defendants."

It was further alleged, in paragraph seven [R. 8], that:

"That as a consequence of the aforesaid restrictions set forth in Paragraph Three of this cause of action, plaintiff COSTEN, because she feared that the defendants would forfeit her franchise and evict her otherwise, did not deal in the goods or merchandise of other manufacturers and distributors of ladies' sportswear than the defendants, and as a consequence thereof was unable to profitably operate a business of retail sales of clothing at the aforesaid location in the City of San Leandro, and plaintiff COSTEN was therefore damaged, as above alleged."

The complaint further alleges that (1) a purpose and effect of the combination was to unreasonably and arbitrarily monopolize or attempt to monopolize commerce in ladies' sportswear, (2) seventy-five such franchise and sub-lease agreements were made

"Said sub-junct and said franchise agreement were expressly conditioned upon restrictions that plaintiff could only in India, sportswear manufactured and sold by defendant and plaintiff could not sell or otherwise dispose of any merchandise or goods of plaintiff or sold by anyone other than the defendant, such restrictions over the company under said sub-junct to an obligation to purchase women's sportswear for resale from the defendant."

It was further alleged, in paragraph seven (8), that:

"That as a consequence of the above said restrictions set forth in Paragraph Three of this cause of action, plaintiff, GUTH, because she feared that the defendant would forfeit her franchise and void her obligation, did not want to be bound or restricted of other merchandise and 'distinctive of ladies' apparel' over from the defendant, and as a consequence thereof was unable to profitably operate a business of ladies' apparel at the aforesaid location in the City of Los Angeles, and plaintiff GUTH has therefore damaged, as above alleged."

The complaint further alleges that (1) a

purpose and effect of the cooperation was to restrain

and arbitrarily monopolize or attempt to monopolize

the commerce in ladies' sportswear, (2) prevent-free

and franchises and sub-lease agreements were made

throughout California with the purpose and effect of controlling merchandising of ladies' sportswear, (3) the franchisees were prohibited from engaging in similar business in California, from merchandising other ladies' sportswear, and from merchandising similar goods produced by others, and (4) that Appellees "possessed monopoly power over the merchandise sold to plaintiff COSTEN, in that it bore the defendant's trade name 'Pauline's Sportswear.'" "

throughout California with the purpose and effect of
controlling merchandising of ladies' sportswear, (c)
the franchisees were prohibited from engaging in sim-
ilar business in California, from merchandising ladies'
sportswear, sportswear, and from advertising similar
goods produced by others, and (d) that appellees pro-
posed to control goods and the merchandise sold by
appellees, to that it have the defendant's
trade name "Pamela's Sportswear."

A R G U M E N T

I. DISMISSAL OF THE CLAIMS AT THE PLEADING STAGE WAS IMPROPER AS A MATTER OF PROCEDURE.

The Appellees' motions to dismiss the action for the asserted insufficiency of the complaint raises two significant questions: (1) whether franchising arrangements should generally be considered exempt from the antitrust laws, and (2) whether complaints based upon alleged illegal franchising arrangements can be disposed of at the pleading stage of the proceedings.

The motions were seemingly based upon Fed. R. Civ. P., Rule 12(b). Appellants have found a similar case, which was also presented on a motion to dismiss for failure to state a claim. This decision is Hathaway Motors v. General Motors Corporation, 18 F. R. D. 283 (D. Conn. 1955). This case was filed for treble damages under the antitrust laws against a group of franchisors, including General Motors Corporation. The District Court observed that the damages alleged were that plaintiffs had been forced out of

DISMISSED BY THE COURT AT THE PRELIMINARY
HEARING AS A MATTER OF COURTESY.

The following methods to obtain the action

the various instances of the complaint which

the significant questions: (1) whether the complaint

should generally be considered as a

the various laws, and (2) whether the complaint

should upon alleged illegal receiving information

be disposed of as the receiving agent of the gov-

ernment.

The various laws generally have been held to

be, F. 4, 1940 (1940). The various laws have been held to

be, which was also presented as a matter to be decided

to refer to state a claim. This decision is

United States v. [Name], 10 F.

1, 283 (U. S. 1950). This case was cited for

the various laws the various laws against a

copy of the various laws, including the various laws

also. The various laws covered that the various

alleged were that the various laws had been found to be

business because they were not able to compete with the franchise dealers. This fact of the Hathaway case is the only difference from the one now at bench. The pleading issue is identical, and as in the Hathaway case, the motion to dismiss should not have been granted.

The Court in Hathaway Motors held that circumstantial evidence could conceivably uphold the general allegations of the complaint, and therefore denied the motion to dismiss. The Court observed:

"In dealing with a motion to dismiss for failure to state a claim, the rule of Dioguardi v. Durning, 10 Cir. 1944, 139 F.2d 774, should be kept in mind. Such dismissal should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 18 F.R.D. at 284.

The Hathaway decision was roundly approved by the late Judge Charles E. Clark, who in large measure drafted the Civil Rules. See Clark, "Special Pleading in the 'Big Case'," 21 F.R.D. 45, 52 (1957); and it was approved by the Court of Appeals in Nagler v.

mainly because there were not left to compete with
the American business. This fact of the highway
and is the only difference from the one now in
view. The proposed issue is identical, and as in
a highway case, the motion to dismiss should not
be granted.

The Court in Highway before held that the
statistical evidence would conclusively show the
material differences of the companies, and therefore
dismiss the motion to dismiss. The Court observed:

"In dealing with a motion to
dismiss for failure to state a claim,
the rule of Highway v. Landis, 30
Ct. 284, 193 F.2d 971, should be
kept in mind. Such dismissal should
not be granted unless it appears to
a reviewing court that the complaint
as so framed does not state a claim
which could be proved in support of
the claim." 30 F.2d at 971.

The highway decision was recently approved by the
late Justice Charles E. Clark, who in large measure
crafted the Fifth Circuit. See Clark, "Special Handling
in the 'Big Case,'" 21 F.R.D. 43, 32 (1957); and it
was approved by the Court of Appeals in Highway v.

Admiral Corporation, 248 F.2d 319, 325-6 (2d. Cir. 1957).

Another such similar case is P. H. Machinery v. Harnischfeger Corporation, 207 F.Supp. 392 (D Minn. 1962). In This case also the motion before the court was one to dismiss the complaint, and defendants additionally had moved for summary judgment. Plaintiff alleged that it had entered into dealer agreements with defendant for sale and service of certain equipment manufactured by defendant. In overruling the motions to dismiss and for summary judgment on the claim asserted under the Sherman Act and Clayton Act, the Court held as follows:

"It is undoubtedly true, as the cases cited by defendant indicate, that under certain circumstances an exclusive dealership agreement between a manufacturer and a dealer, similar to the one herein alleged, may not in and of itself constitute a violation of the anti-trust laws. However, the complaint not only alleges an exclusive dealership agreement between defendant and Mesaba, but goes on to allege that the purpose and result of such agreement has been to conspire to eliminate competition and restrain trade and to acquire a monopoly. A showing of such

151.

Another such relative case is E. H. Rosten
Maintenance Corporation, 307 F.2d 992 (10th Cir. 1962). In this case also the court before the court
was not to disturb the complaint, and defendant's motion
for summary judgment was denied. Plaintiff
alleged that it had entered into certain agreements
with defendant for sale and service of certain goods
not manufactured by defendant. In concluding the
court to dismiss was for summary judgment on the
basis asserted under the Uniform Act and Uniform Act,
the Court held as follows:

"It is undisputed that, as the
court stated in its opinion, plaintiff
did not enter into any agreement with
defendant for sale and service of certain goods
not manufactured by defendant, and that
in the case before the court, the court
was not to disturb the complaint, and defendant's motion
for summary judgment was denied. Plaintiff
alleged that it had entered into certain agreements
with defendant for sale and service of certain goods
not manufactured by defendant. In concluding the
court to dismiss was for summary judgment on the
basis asserted under the Uniform Act and Uniform Act,
the Court held as follows:

circumstances surrounding an agreement of this type might well make out a case for violation of the Sherman Anti-Trust Act, and, consequently, it does not appear to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 207 F.Supp. 394-5.

One of Appellees' principal contentions has been that a dealer-franchisee has no standing to prosecute a treble damage action arising out of his relationship with his supplier-franchisor. This notion is neatly rebutted by the decision in Girardi v. Gates Rubber Co., 325 F.2d 196 (9th Cir. 1963). The Ninth Circuit there held that plaintiff was entitled to try his antitrust action, even though plaintiff Girardi had followed the suggested pricing from March, 1951, until early 1954. 325 F.2d at 197.

The exclusive dealing arrangements, alleged herein, are illegal, depending upon proof of relative strength of the parties, the proportionate volume of commerce involved, and the effects on competition in the market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 324 (1961). These questions simply can

circumstances surrounding an agreement of this type might well make out a case for violation of the Sherman Anti-Trust Act, and, consequently, it does not go to a contrary that plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 207 F. Supp. 396-2.

One of appellee's principal contentions was that a master-franchise has no standing to prosecute a triple damage action arising out of his relationship with his supplier-associate. This contention was rejected by the decision in Citard v. Galt (317 F.2d 104 (5th Cir. 1963)). The court there held that plaintiff was entitled to say in antitrust action, over those plaintiff cited followed the suggestion arising from March 1961, 1962, 1963, 1964, 1965, 1966, 1967.

The decision dealing antitrust, arising from the alleged, resulting upon proof of violation of the statute, the protective nature of the statute, and the effect on competition in the market. James H. Hester Co. v. Galt (317 F.2d 104 (5th Cir. 1963)). These questions arise from

not be resolved at the pleading stage of this case. The territorial limitations may be illegal per se, depending again on the proof at trial. White Motor Co. v. United States, 372 U.S. 253 (1963), reversing a summary judgment.

and be resolved in the pleading stage of this case.
The restricted limitations may be lifted per se,
depending upon the proof at trial. United States
v. United States, 15 U.S. 224 (1978), involving
summary judgment.

II. APPELLEES' FRANCHISES WERE ILLEGALLY TIED TO THE FRANCHISORS' POSSESSORY RIGHTS TO THE PARTICULAR LOCATIONS, BY USE OF SUB-LEASES.

One of the Appellees' contentions before the lower court was that as a single trader and franchisor it was somehow exempted from application of the antitrust laws. It is not apparent whether or not the District Court adopted this point of view. The contention is mistaken, however, as best stated in an opinion of Chief Judge Sobeloff, Osborn v. Sinclair Refining Company, 324 F.2d 566, 573 (4th Cir. 1963).

In the Osborn case the defendant required its gasoline dealers, as a condition for leasing service stations and purchasing gasoline from it, also to buy substantial quantities of tires, batteries, and accessories. Sinclair's principal defense was that its conduct in terminating the plaintiff was a simple unilateral refusal to deal, lawful under United States v. Colgate & Co., 250 U.S. 300 (1919). Chief Judge Sobeloff relied upon the decision in United States v. Parke, Davis & Co., 362 U.S. 29 (1960), in

APPELLATE, THEREFORE, WERE ILLEGALLY MADE TO
THE FRANCHISES, POSSESSORY RIGHTS TO THE MAR-
TINIQUE LOCATIONS, BY ONE OF THE LATTER.

One of the Appellants' contentions before

the Court was that the Appellants had been
deprived of their property without compensation
and without just compensation. It is not necessary
to the Court's decision to adopt this point of view.
The contention is mistaken, however, as best shown
by the opinion of Chief Judge Sobushoff, Corbin v.

Atlantic Refining Company, 220 F.2d 502, 577 (2d Cir.
1955).

In the Corbin case the government acquired
the gasoline business, as a condition for leasing
military stations and petroleum facilities from it.
Also to the substantial acquisition of these facilities,
and the acquisition. Chief Judge Sobushoff stated that
that the contract in terminating the plaintiff was a
single material refusal to grant further order United
States v. Corbin & Co., 220 F.2d 502 (1955). Chief
Judge Sobushoff relied upon the decision in United
States v. Texas, Davis & Co., 220 F.2d 502 (1955), in

dealing with this argument, stating:

"There the Court indicated that if a seller does no more than announce a policy designed to restrain trade, and declines to sell to those who fail to adhere to the policy, he has not put together a combination or arrangement violative of the antitrust laws. However, the Court emphasized that if the seller goes further, if he engages in actions extending beyond the bare announcement of his policy and the declination to sell "and he employs other means which effect adherence" to his policy, he has engaged in a combination or arrangement condemned by the antitrust laws. He can then no longer rely upon his "right" of customer rejection. There is no indication in Parke, Davis, or in any other case, that these principles regarding refusals to deal vary, depending upon whether there is a monopoly or concerted action with co-conspirators, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, irrespective of monopoly or conspiracy, if the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by Colgate." 324 F.2d 573.

"Tying arrangements have been defined as agreements by a party to sell one product only on the condition that a buyer also purchase a different, or tied

"There the Court indicated that it is
 rather than to have the business a
 policy designed to certain cases, the
 decision to call to order the bill as
 adverse to the policy, he has not yet
 suggested a combination of arrangements
 violation of the statute itself. How-
 ever, the Court mentioned that it is
 action that further, it is suggested in
 action extending beyond the fact of
 government of his policy and the de-
 action to call "and he suggests other means
 which direct reference" to the policy,
 he has suggested in a combination of ar-
 rangements suggested by the business
 laws. He has then no longer call upon
 his "right" of business violation.
 There is no indication in law, policy,
 or in any other case, that laws which
 relate regarding business to deal with
 depending upon whether there is a com-
 pany or concerned action with co-
 laws, or whether, on the other hand,
 laws relate upon other laws of business-
 ment in violation of laws, to the com-
 pany, irrespective of whether it con-
 sidered, if the action concerned the
 interests of business laws relating to
 laws which business, or business
 dealing of the law, he has not suggested
 an unlawful arrangement and laws dis-
 call outside the action government af-
 fected by Congress. X 11, 12, 13.

"Typing arrangements have been defined as agree-

ments by a party to call and protect only on the same

time that a paper also contains a definition, or that

product, from the seller, or that a buyer not purchase the tied product from any other supplier." Comment, 74 Yale L. J. 691 (1965). One of the most recent decisions involving tying arrangements is United States v. Loew's Incorporated, 371 U.S. 38 (1962), which was a challenge against block booking of motion pictures on television as violative of Sherman Act § 1. The Court there observed that "tying arrangements once found to exist in context of sufficient economic power, are illegal 'without elaborate inquiry as to . . . the business excuse for their use,' Northern Pacific R. Co. v. United States, 356 U.S. 1, 5." 371 U.S. 51-52.

Appellants, at this stage in the case at bench, do not contend that the sub-lease tie-in is or is not subject to application of a per se test such as that of International Salt Co. v. United States, 332 U.S. 392 (1947).

Rather, Appellants contend that the controlling test is that laid down in Northern Pacific Ry. v. United States, 356 U.S. 1 (1958), holding that tying arrangements,

...from the seller, or that a buyer and seller
have the same amount from the same supplier.
...comment, 35 Fed. Cl. 11, 1961 (1961). One of the most
recent decisions involving such arrangements is
United States v. Low's Inc., 371 U.S. 48, 30
1962, which was a challenge against those making
a bottom picture on television as a violation of
Section 4. The Court there observed that
such arrangements were found to exist in certain
situations involving power, and illegal business
practices might be found in the business world.
...United States v. Low's Inc., 371 U.S. 48, 30
1962. 371 U.S. 48, 30 1962.
Appellate, at this stage in the case of
each, do not consider that the evidence herein is
not subject to application of a per se test.
...that of International Salt Co. v. United States,
33 U.S. 393 (1962).
Each, Appellate court, that the control-
ling test is that laid down in United States v. ...
United States v. ..., 33 U.S. 393 (1962), holding that tying

"are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."
356 U.S. at 6.

Appellants are not taking the same position as was taken by the plaintiffs in Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), wherein plaintiffs stipulated that they were relying solely on per se violations of the antitrust law. There is another distinction from the Carvel case, namely, that the present appeal involves a true tie-in because the sub-leases bind the physical premises to the exclusive-dealing franchise agreement.

This aspect of the present case also brings it within the provisions of Clayton Act § 3, 15 U.S.C. § 14. Appellants recognize that proof of Clayton Act § 3 violation must include a showing that the arrangement substantially lessened the competition or tended to create a monopoly in a line of commerce. The District Court, however, did not allow Appellants to go to trial on this issue or any other issue.

"the defendant is not a competitor
wherever a truly new product is
being brought into the market for the first
time. It is not a competitor in the
market for the first time
product and a 'not a competitor' moment
of infinite duration is allowed."
350 U.S. at 51.

Appellants are not taking the same position

was taken by the plaintiff in Ross v. Cross

311 F.2d 102 (2d Cir. 1963), wherein plaintiff

alleged that they were relying solely on the

violation of the antitrust law. There is no

distinction from the Case case, namely, that the

same appeal involves a true tie-in between the two

cases and the physical purchase of the defendant

being franchise agreement.

This aspect of the present case was stated

within the guidelines of Circuit Act 2, 15 U.S.C.

15, appellants recognized that proof of injury and

violation was limited to showing that the average

and substantially lessened the competition or tended

to create a monopoly in a line of commerce. The lit-

igant Court, however, did not allow appellants to

rely on this issue or any other issue.

A recent decision of this court, Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), a treble damage suit by a service station operator, explains the bases of the Sherman Act § 1 tie-in claim. In Lessig the court held that a tying arrangement was unlawful under Section 1:

- (1) when there is sufficient economic power to impose an appreciable restraint on free competition in the tied product;
- (2) that this power may be inferred from the tying product's desirability or uniqueness;
- (3) power to monopolize need not be demonstrated;
- (4) full scale inquiry into the scope of the relevant market and the seller's share is unnecessary; and
- (5) the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product.

327 F.2d at 469-470.

Certainly the allegations in both the original and the amended complaints in the present case embrace facts sufficient to support a finding of an

A recent decision of the Court, United States v. ...

United States v. ..., 327 F.2d 872 (9th Cir. 1964), is

which deals with a service station operator.

On the basis of the above we find that the

in United States v. ... the court held that a typing

was not a substantial factor in

(1) when there is sufficient evidence to show an intention to defraud in the first place.

(2) that the power was not obtained from the typing operator's responsibility or negligence.

(3) power to manipulate was not a substantial factor.

(4) that while the power was not a substantial factor, the power was not a substantial factor in the

(5) the regulation of the typing process may be obtained from the power's negligence in issuing a typing commission upon a substantial amount of evidence in the first place.

327 F.2d at 874-875.

Consequently the allegations in the first

and the second paragraphs of the present case

which have been submitted to support a finding of

illegal tie-in under these requirements of the Lessig case. The tied product is ladies' sportswear and the tying product is the leased space or franchise location.

III. APPELLANTS SHOULD HAVE THEIR DAY IN COURT
TO PROVE THEIR CLAIM UNDER CLAYTON ACT § 3.

The preceding argument attacking the tie-in aspects of the franchises touches upon Appellants' claims under Clayton Act § 3. Section 3, however, strikes particularly at exclusive dealing practices. It has been said that the test of Section 3 "is a somewhat friendlier test than that applied to tie-ins, since it requires proof of a substantial share of a relevant market" Kaysen & Turner, Antitrust Policy 147 (1959).

The leading case on exclusive dealing, applying Clayton Act § 3, is Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949), holding that exclusive supply contracts with independent dealers were illegal. The Court there interpreted the qualifying language of Section 3, namely, "where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." After examining and rejecting many suggested tests, the Court held, "the qualifying clause of § 3 is satisfied by

11. APPELLANTS SHOULD HAVE THEIR OWN EVIDENCE
TO PROVE THEIR CLAIM UNDER CLAYTON ACT § 1.

The preceding argument regarding the effect

of the provisions of the Clayton Act § 1, however,

is not particularly relevant to the present case.

It has been said that the test of Clayton § 1 is a

substantial injury to the competitive structure of the

marketplace, and that this is applied to the facts

of the case. It is not necessary to repeat the facts of a

case in order to show that it is a violation of Clayton Act § 1. See United States v. Brown & Root, Inc.

137 F.2d 101 (1943).

The finding that the defendant violated Clayton Act § 1

is not sufficient to establish a violation of Clayton Act § 1. See United States v. Brown & Root, Inc.

137 F.2d 101 (1943). It is necessary to show that the

defendant's conduct was in violation of Clayton Act § 1.

The Court found that the defendant's conduct was in violation of Clayton Act § 1.

It is not necessary to repeat the facts of the case.

It is sufficient to show that the defendant's conduct was in violation of Clayton Act § 1.

It is not necessary to repeat the facts of the case.

It is sufficient to show that the defendant's conduct was in violation of Clayton Act § 1.

It is not necessary to repeat the facts of the case.

proof that competition has been foreclosed in a substantial share of the line of commerce affected."

337 U.S. at 314.

The original complaint in Count Three, paragraph 6 [R. 8], set up the factual claim in accord with the Standard Oil Co. criterion with these allegations:

"The purpose and effect of the aforesaid restrictions and sales were to substantially lessen competition or tended to create a monopoly in ladies' sportswear by unreasonably and arbitrarily restricting the opportunity of defendants' competitors to market their products."

The same allegations appear again in Count Two, paragraph 6 of the first amended complaint [R. 119].

The effect in the instant case is, of course, the same effect as obtained in Standard Oil Co., supra. When the franchisee or dealer observes his contract, he forecloses his franchisor's competitors from "whatever opportunity there might be to attract his patronage." 337 U.S. at 314. Or, as the Court also said, "use of the contracts creates just such a clog on

and that company has been licensed to a sub-
sidiary of the same company.

U.S. vs. SIA.

The original complaint is dated March, 1934,
page 6 of 12, set up the factual basis in regard
to the Standard Oil Co. litigation with these allegations:

"The purpose and effect of the
alleged conspiracy was to secure
to themselves a monopoly in the
oil business in the United States
and to prevent the operation of the
oil business in the United States
from being conducted in a fair
and open manner."

The same allegations appear again in the second
complaint in the first volume - complaint No. 117.
The effect in the instant case is, of course,
the same since we are dealing with Standard Oil Co., Inc.
and the Commission is dealing with the same
company. The Commission's representative has
stated that it is possible that he is not
entirely sure of the facts in this case.

competition as it was the purpose of § 3 to remove

. . . . " Ibid.

A strikingly similar case, decided after Standard Oil Co., supra, is United States v. Richfield Oil Corp., 99 F.Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 665 (1952). The Richfield decision involved "leased-out" stations as well as dealer stations. The leased-out station arrangements were similar to the Pauline's Sportswear sub-lease franchises, in that the lease included a clause "merging into the instrument all other agreements." 99 F.Supp. at 287. The trial judge found, as a matter of fact, that the leases,

"and the oral agreements superimposed on them confine the operations of the stations to which they apply to dealing exclusively with Richfield petroleum products and automotive accessories handled or sponsored by Richfield." 99 F.Supp. at 297.

The judgment that the agreements were illegal and enjoined was affirmed per curiam on the authority of the Standard Oil Co. case, supra. 343 U.S. 665 (1952).

qualifying as in the purpose of § 1 to remove

1918.

A seemingly similar case, *United States v. Nichols*

United Oil Co., supra, 22 *United States v. Nichols*

1918, 22 *United States v. Nichols*, 22 *United States v. Nichols*

1918, 22 *United States v. Nichols*, 22 *United States v. Nichols*

involved "leased-out" sections as well as dealer sec-

tions. The leased-out section agreements were anal-

ous to the leasing's short-term and long-term agreements.

That the lease included a clause "leasing into the

leased-out section agreements." 22 *United States v. Nichols*

22 *United States v. Nichols*, 22 *United States v. Nichols*

1918.

"and the oil agreement suggested
to these courts the operation of the
system to which they apply to dealing
exclusively with single sections
leased out and automatic operations
provided as suggested by Nichols." 22
1918, at 241.

Judgment and the agreement were illegal and

voidable and should be voided on the authority

the *Standard Oil Co., supra*, 22 *United States v. Nichols*

1918.

Finally, it is submitted that allegations of the instant complaint were well within the standards prescribed by this court in Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), for a jury verdict based upon Clayton Act § 3. See 327 F.2d at 467-470. It is respectfully submitted that Appellants should be accorded the same opportunity as are other litigants to prove their claims under Clayton Act § 3.

Finally, it is submitted that allegations
the instant complaint were well within the scope
as prescribed by this court in Leslie v. Truitt
120 F.2d 857, 858 (9th Cir. 1941), for a party
which brings upon litigation the issue of
whether it is reasonably anticipated that disclosure
would be accorded the same opportunity as was afforded
allegance to prove those claims under Division 2 of § 3.

IV. APPELLANTS SHOULD HAVE THEIR DAY IN COURT TO
PROVE THEIR CLAIM UNDER SHERMAN ACT § 2.

Count Two of the original complaint [R. 5-7]
set up Mrs. Costen's claim under Sherman Act § 2,
alleging, in part:

"An additional purpose and an additional
effect of the aforesaid combination or
conspiracy was to unreasonably and ar-
bitrarily monopolize or attempt to mono-
polize that part of the trade or commerce
among the several states having to do
with the sale and distribution of manu-
factured ladies' sportswear." [R. 5-6].

As was true of all but the Sherman Act § 1
allegations, the District Court in no way mentioned
or discussed any reason for dismissing the complaint
as to Counts Two, Five, Eight, and Eleven - the Sherman
Act § 2 counts. See Order Granting Defendants' Motion
to Dismiss filed on November 24, 1965 [R. 93-94]. Nor
did the order [R. 153] disposing of the amended complaint
state any reasons for the District Court's action.

We turn, then, to a somewhat similar case
wherein the trial judge withdrew Section 2 charges from
the jury, Lessig v. Tidewater Oil Co., 327 F.2d 459
(9th Cir. 1964), discussed supra. Lessig was a matter

where Tidewater's exclusive dealing and tie-in arrangements were attacked. In its decision reversing the trial judge, this court held as to Section 2, that:

"The essence of monopoly is power to control prices and exclude competition, and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.

* * * *

"We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires - perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

"When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' United States v. E. I. Du Pont & Co., 351 U.S. 377, 395 n. 23 (1956)."

327 F.2d at 474.

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See also Judge Learned Hand's opinion in the famed Alcoa case, U. S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Although the Alcoa facts are unique, one principle of that decision is important to the present case, namely, that the intent violative of Section 2 may be implicit in the monopolistic conduct.

Further, Section 2 reaches plans or programs to monopolize, even though there be no monopolistic result at the time the suit is filed or tried. Times-Picayune Pub. Co. v. U. S., 345 U.S. 594 (1953). Appellants submit they have a right to test their Section 2 allegation, whether it be to prove a monopolistic conspiracy or an attempt to create a monopoly.

CONCLUSION

Appellants began their argument from the premise that this action should not be determined at the pleading stage, although it would necessarily be a difficult, tedious case to try. In ensuing sections of this brief, Appellants have sought to demonstrate that their allegations do set forth claims upon which relief may be granted.

It is noted that only the allegations of the Costen counts have been examined in detail, but the claims of the other Appellants are nearly identical in substance. Appellants respectfully submit that all claims of the original complaint are entitled to a full hearing as to the legality of the purpose, design, and effect of Appellees' franchising practices. It is submitted that the District Court should be reversed and the cause remanded with directions that Appellees answer the original complaint.

Respectfully submitted,

FULLERTON, LANG & RICHERT

By _____
William T. Richert

Appendix begins their argument that the
 while that this action should not be determined
 the pleading stage, although it would normally
 a difficult, tedious case to try in court
 of this kind, Appendix has sought to
 measure that their allegations of bad faith claims
 on which relief may be granted.

It is noted that only the allegations of the
 claimants have been reviewed in detail, but the
 aims of the other claimants are mostly identical
 substance. Appendix respectively submit that
 a claim of the original complaint are entitled to
 full hearing as to the validity of the purpose,
 effect, and effect of Appendix' findings con-
 sider. It is submitted that the District Court should
 proceed and the case proceed with Appendix
 of Appendix versus the original complaint.

Respectfully submitted,
 William T. Smith

 William T. Smith

ATTORNEY'S CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William T. Richert

